

ORIGINAL

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J.G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

April 9, 1998

EX PARTE OR LATE FILED

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

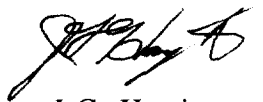
Re: Oral Ex Parte Presentation
CC Docket No. 96-45
AAD/USB File No. 98-37

Dear Ms. Salas:

On Thursday, April 9, 1998, Kenneth Salomon and the undersigned, counsel for the Iowa Telecommunications and Technology Commission, met with Valerie Yates of the Common Carrier Bureau. During that meeting we discussed the attached materials, which were left with Ms. Yates, and the implications of the cases described in those materials for this matter.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and a copy is being provided to Ms. Yates by the close of the business day following the meeting. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,


J.G. Harrington

JGH/vll
Attachments

cc (w/o attach.): Valerie Yates

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IOWA COMMUNICATIONS NETWORK
REQUEST FOR DETERMINATION OF CARRIER STATUS
CC DOCKET NO. 96-45 ♦ AAD/USB FILE NO. 98-37

Background on the Iowa Communications Network

- ICN was authorized in 1989, after a lengthy planning process, to provide telecommunications services to secure the future of rural Iowa. Private participation was sought initially. The state built the initial elements of the network only because LECs did not respond to an RFP. The first two phases are state owned; the third phase is leased.
- ICN provides a wide range of services, including long distance, distance learning, telemedicine and Internet.
- Eligibility to use services is established by statute. Distance learning services are available to all entities, public and private, that provide instructional services. Telemedicine services effectively are available to any facility used by a doctor.
- No agency or entity is required to use the ICN.
- ICN's services are offered under standard terms and conditions that do not vary from customer to customer.

The ICN Request for Determination

- The *Fourth Reconsideration Order* finds that "state telecommunications networks" generally will not be eligible for universal service reimbursement for services provided to schools, libraries and rural health care institutions based on their specific characteristics, including:
 - Limitation of service to government agencies.
 - Operation entirely through resale of other carriers' services.
 - Requirements that state agencies use the state network.
- ICN does not seek reconsideration of the *Fourth Reconsideration Order*.
- ICN seeks a determination that it has characteristics that differ from those of "state telecommunications networks" and that it is a telecommunications carrier.

The Effects of Commission Action in This Matter

- In some cases, and especially in rural Iowa, ICN is the only source for advanced services today, so failure to grant ICN's request will mean that the affected schools and libraries will be unable to obtain any support at all.
- Absent grant of ICN's request, some schools and libraries will be eligible for support (*i.e.*, those that get service via resold facilities) and some will not (*i.e.*, those that get service via ICN's own facilities), even though the service they receive is identical. Grant of the request will ensure equitable treatment for all schools and libraries in Iowa.
- Grant of ICN's request will increase the number of options available to schools, libraries and rural health care institutions and therefore should reduce the overall costs of obtaining those services.

ICN's Status as a Telecommunications Carrier

- The Commission has held that a common carrier is a telecommunications carrier. Under longstanding principles of law, a common carrier must hold itself out indifferently to its potential customers on standard terms and conditions.
- A carrier need not provide every possible service and may choose to serve only particular types of customers. For instance, competitive access providers historically offered only access services and served only large businesses and long distance carriers. The *Universal Service Order* acknowledges that an entity may be a carrier even though it has a specifically limited customer base.
- ICN's distance learning and telemedicine services are available to all potential customers of those services. Although ICN's governing statute specifies the customers it may serve, for these services ICN is allowed to serve all potential customers, public or private.
- ICN offers its services on standard terms and conditions. Although ICN does not file tariffs, there are many carriers that are not required to file tariffs, including CMRS providers and interstate competitive access providers.
- Based on these facts, the Iowa Utilities Board, the certifying agency in Iowa, has concluded that ICN meets the criteria for being a telecommunications carrier.
- ICN will comply with all common carrier and telecommunications carrier obligations, including universal service contributions.

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The following is a list of examples outlining the criteria for being a common carrier as an entity which holds itself out indifferently to all *potential* customers for its particular services on standard terms and conditions. The Iowa Communications Network fits well within this framework because it makes services, including distance learning and telemedicine, available to all potential users of those services.

I. GENERAL PRINCIPLES

- 13 AM. JUR. 2D *Carriers* § 4 (1964); *Bowles v. Weiter*, 65 F. Supp. 359 (E.D. Ill. 1946).

“A common carrier has the right to determine what particular line of business he will follow and his obligation to carry is coextensive with, and limited by, his holding out as to the subjects of carriage. Thus, it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him. If he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed.”

- *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert denied*, 425 U.S. 992 (1976) (*NARUC I*).

Interpreting the meaning of “common carrier,” the District of Columbia Circuit concluded that an entity may be a common carrier even though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population, and business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted.

II. COMMON CARRIERS AND COMMON CARRIER SERVICES LIMITED BY STATUTE AND REGULATION

- The Communications Satellite Act of 1962 — 47 U.S.C. § 735 (1962).

Title III of the Communications Satellite Act (“Act”) authorizes the creation of a communications satellite corporation (“corporation”), subject to the provisions of the Act. The corporation was provided with limited authority to “plan, initiate, construct, own, manage, and operate itself . . . [as] a commercial *communications satellite system*.” Although only permitted by statute to provide satellite services, the corporation was deemed a common

carrier within the meaning of section 3(h) of the Communications Act of 1934. *See* 47 U.S.C. § 741 (1962).

- *In re Graphnet Systems, Inc.*, 73 F.C.C. 2d 283 (1979).

Electronic Computer Originated Mail (ECOM) service to be offered by U.S. Postal Service using Western Union services and facilities is common carrier offering where ECOM is a quasi-public offering for a for-profit service which affords the public an opportunity to transmit messages of its own design and choosing. Uncontroverted evidence that ECOM service was identical to the Western Union Mailgram offering in scope, service, operation and facilities also led the FCC to conclude that ECOM was a common carrier communications service subject to FCC jurisdiction – where Western Union had tariffed the electronic communications segment of Mailgram with the FCC in recognition that it is the type of common carrier communications service subject to the Communications Act. *See* 39 U.S.C. § 404 (1980) (Congress established the United States Postal Service pursuant to Title 39, furnishing it with the *limited* authority to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail and to provide philatelic services.).

- The National Railroad Passenger Corporation (“Amtrak”) — 45 U.S.C. § 541 (1987).

Title III of the Rail Passenger Service Act created Amtrak for the purpose of providing intercity and commuter passenger rail service. Amtrak is defined as a common carrier of railroad transportation. *See* 49 U.S.C. §§ 24301(a)(1), 10102(6) (1997). Congress furnished Amtrak with the *limited authority* to operate and maintain facilities necessary for the provision of rail passenger transportation, the transportation of mail and express, and auto-ferry transportation. 49 U.S.C. § 24305 (1997).

- Applications of Telephone Common Carriers to Construct and/or Operate Cable Television Channel Facilities in Their Telephone Facilities — 47 C.F.R. §§ 63.54, 63.55 (1995).

Pursuant to 47 C.F.R. § 53.54(d)(3), the FCC authorized telephone companies to acquire cable facilities for the *limited purpose* of providing common carrier channel service to a *limited class* of users – franchised cable operators – via those facilities subject to section 214 certification. 47 C.F.R. § 63.55 provides that applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems in their service areas shall include a showing that the applicant is unrelated and unaffiliated with the proposed cable operator.

III. COMMON CARRIERS CHOOSING TO LIMIT THE SCOPE OF THEIR SERVICES

- *In re Application of Tower Communication Systems Corporation*, 59 F.C.C. 2d 130 (1976).

Tower Communication Systems Corporation (“Tower”) applied for authority to establish and operate a communication channel through a domestic satellite “receive only” earth station. The receive-only earth station would be used for the reception of video signals of Home Box Office transmitted via RCA Global Communications Corporation’s domestic satellite system for distribution by Tower on a common carrier basis via terrestrial facilities. The FCC classified the facility as a common carrier, even though it was serving only its own affiliate, where the facility would not interfere with other common carriers.

- Telestra, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire Capacity in International Facilities for the Provision of Switched and Private Lines Services between the U.S. and Australia, *Memorandum Opinion, Order and Certificate*, 13 FCC Rcd 205 (1997).

Telestra, Inc. (“TI”) filed a request for authorization to acquire and operate facilities for the provision of switched and private lines service between the United States and Australia. The FCC granted TI’s request concluding that the grant of TI’s application for facilities-based switched and private-line service on the U.S.-Australia route was in the public interest. The FCC also determined that TI should be regulated as a common carrier. *See also* Application of IDC America, Inc.; Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service Between the United States and Japan, *Order, Authorization, and Certificate*, File No. I-T-C-96-685, DA 97-571 (rel. March 21, 1997) (granting IDC America, Inc.’s (“IDC”) request for authority to resell non-interconnected international private lines between the United States and Japan. IDC was classified as a non-dominant carrier for that particular service.).

- Application of ITT World Communications Inc., for Temporary Authority, Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Television Broadcasters a Television Earth Station via Early Bird Satellite, *Order and Authorization*, 3 F.C.C.2d 628 (1966).

ITT World Communications Inc. sought authority to provide television broadcasters a common carrier television transmission service via satellite through the use of the transportable earth station. *See also* IDB

Communications Group, LTD; Application to Modify its License for its Domestic Transmit/Receive Earth Station (E7754) at Culver City, California to Add the ANIK Satellite as a Point of Communication for Service between the U.S. and Canada, Order Authorization and Certificate, File No. 2805-DSE-MP/L-85 (rel. Feb. 14, 1986) (The FCC's order granted authority to several parties to permit communications with the Canadian ANIK satellites for the provision of audio and video transmission service between the U.S. and Canada).

- Consortium Communications International, Inc., Application for Authority to Acquire and Operate Facilities for the Provision of Telex Service between the U.S. and India, *Order, Authorization and Certificate*, 5 FCC Rcd 6562 (1990).

Consortium Communications International, Inc. ("CCI") filed a request for authority pursuant to Section 214 to acquire and operate facilities for direct telex service (and only telex service) between the U.S. and Japan. The FCC granted the request concluding that the "present and future public convenience and necessity require that provision of direct telex service to India by CCI." The FCC required CCI file a tariff for the proposed service in accordance with its Order.

- *Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Serv. Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980).

A group of persons offered a one-way paging service to physicians (and only physicians) in a small region of the state. The service was available to all physicians within the area that requested service. The Pennsylvania Public Utility Commission ("PA PUC") concluded that the one-way paging service offered to a limited portion of the public constituted a common carrier public utility service. Specifically, the PA PUC reasoned that "[w]hether a service is being offered 'for the public' and therefore properly classified as a public utility service, requires a determination whether or not such service is being held out, expressly or impliedly, to the general public as a class, or to *any limited portion of it*, as contradistinguished from being offered only to particular individuals."

- *State Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251 (Iowa 1934).

An operator of a truck carrying theater films and advertising materials over a regular route to members of a film association was deemed a common carrier subject to statutory provisions. In making this determination, the Iowa Supreme Court concluded that to be classified as a common carrier, "it is not necessary . . . that he be required to carry goods for any description for every person offering the same. It is not necessary that he carry all kinds of goods, if he professes to carry only a certain kind, and, if so, this does not take from

him his status as a common carrier.” Indeed, as the court noted, “[i]f he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier or agricultural implements such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses.” (citing supporting case law from Kansas, California, Illinois, Indiana, Michigan and Oregon). Because the truck operator sought to offer his transportation service to all theaters in his territory he was a common carrier subject to the Iowa regulations.

- *In re United Parcel Serv.*, 256 A.2d 443 (Me. 1969).

The United Parcel Service (“UPS”), a corporation engaged in transportation of both interstate and intrastate items of limited size and weight, applied to the Public Utilities Commission (“PUC”) for authority to operate as a common carrier. The PUC granted the application, finding that UPS was a common carrier. The court affirmed the PUC’s holding, noting that “it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him” Further, the court noted that “[w]e do not think, for example, that it is or could be seriously argued that a highway freight carrier would jeopardize its common carrier standing merely because it did not hold itself out to handle and could not in fact handle petroleum products, articles requiring refrigeration or heavy machinery.”

- *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672 (C.D. Cal. 1995).

The operator of an amusement park ride was a common carrier under a California statute, which broadly defines a common carrier as those who offer to the public to carry persons, property or messages. *See also McIntyre v. Smoke Tree Stables*, 205 Cal.App.2d 489 (Cal. Dist. Ct. App. 1995) (finding common carrier status in guided tour mule ride); *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.App. 4th 1499 (Cal. Dist. Ct. App. 1992), *reh'g denied*, 1992 Cal. App. LEXIS 266, 92 (Cal. Ct. App. 1992), *review denied*, 1992 Cal. LEXIS 1810 (Cal. 1992) (imposing common carrier status on chair lift carrying skiers although carriage is limited to skiers).

over appellant. It is provided by section 5035 of the Code of 1931 that: "Where two vehicles are approaching on any public street or highway so that their paths will intersect and there is danger of collision, the vehicle approaching the other from the right shall have the right of way provided, however, that such vehicles coming from alleys and private drives, where view is obstructed, shall stop immediately before entering a public street or highway."

The distinction in the duties imposed upon traffic by the section last quoted and preceding sections referred to is clearly pointed out in *Dikel v. Mathers*, supra. In view of what is further said in this opinion, the distinction thus established is at present immaterial.

[5-9] If the answer of appellee be construed as admitting the classification of the two highways as alleged in the petition, then clearly, under the statute, appellant had the right of way. The court is of the opinion that such is the necessary effect of the pleading. The answer does not allege that both highways have been designated as county trunk roads, but it does specifically admit that the highway upon which appellant was proceeding was a county trunk road. While the answer does not, in specific terms, admit that the north and south highway is a local county road, yet it does in legal effect recognize a distinctive classification of county roads. There are but two. The form of the admission permits no other interpretation. We have, therefore, a collision occurring at the intersection of an arterial highway and of a local county road. The statute already quoted, in specific terms, gives traffic on the arterial highway the right of way. In the absence of proof to the contrary, we must assume that the board of supervisors of Kossuth county has performed its mandatory duty as to the erection and maintenance of signs. Upon the basis of this assumption, the most favorable duty imposed upon DeBruyn would have been to proceed cautiously across the intersection. This the evidence without dispute shows he did not do. Appellant apparently had his automobile under control, but failed to observe the approach of the automobile from his right. It was, of course, his duty not only to have his automobile under control, but to operate it at a reasonable and proper rate of speed upon entering the intersection. *Carlson v. Meusberger*, 200 Iowa, 65, 204 N. W. 432. Appellant had a right to assume that traffic approaching the intersection from the south would observe the law. Appellant was first to enter the intersection at which he had the right of way. DeBruyn gave no heed to the law but proceeded into the intersection at a heedless and reckless rate of speed. The collision occurred approximately at the center of the intersection east

and west and possibly a trifle to the west thereof. At the time appellant entered the intersection, the DeBruyn car was four or five rods south thereof. The recklessness of DeBruyn does not, of course, determine the question of contributory negligence on the part of appellant, but he was apparently proceeding with his car under control at a reasonable rate of speed, conscious that he had the right of way. He may or may not have been guilty of contributory negligence. The court is of the opinion that he should not be held to have been guilty of contributory negligence as a matter of law. This issue should have been submitted to the jury. It was error, therefore, for the court to direct a verdict for the defendant and the judgment must be and it is reversed.

Reversed.

CLAUSSEN, C. J., and KINDIG, ANDERSON, DONEGAN, MITCHELL, and KINTZINGER, JJ., concur.

STATE ex rel. BOARD OF RAILROAD
COM'RS v. ROSENSTEIN et al.
No. 42315.

Supreme Court of Iowa.
Jan. 16, 1934.

1. Automobiles ⇨76.

Truck operator's status as "common carrier" or "private carrier" is dependent on whether truck operator was engaged in "public transportation" (Code 1931, § 5105-a1 et seq., and § 5105-a40 et seq.).

2. Carriers ⇨4.

What constitutes common carrier is question of law for court, but whether, under evidence in particular case, one charged as common carrier comes within definition of that term and is carrying on its business in that capacity, is question of fact.

3. Carriers ⇨4.

Test of "common carrier" is not whether he is carrying on public employment, nor whether he carries to fixed place, but whether he holds out, either expressly or by course of conduct, that he will carry for hire, so long as he has room, goods of all persons without preference.

A "common carrier" is one who holds itself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation. It is not necessary, however, to

classify one as a public carrier, that he be required to carry goods of any description for every person offering the same, if he professes to carry only a certain kind.

[Ed. Note.—For other definitions of "Common Carrier," see Words & Phrases.]

4. Carriers ⇐39.

Common carrier is under no obligation to carry goods other than those he professes to carry.

5. Automobiles ⇐76.

Motortruck owner and operator carrying theater films and advertising material over regular route or between fixed termini at stated times for nonmembers, as well as members, of purported association, whose agreement with operator called for payment of weekly compensation to him, *held* "common carrier," subject to regulatory statutory provisions (Code 1931, § 5105-a1 et seq., and § 5105-a40 et seq.).

Appeal from District Court, Cerro Gordo County; M. F. Edwards, Judge.

This is an action brought by the state to restrain defendants from operating a motor vehicle, as a common carrier, in violation of chapters 252-A1 and 252-A2 of the Code of 1931. The lower court entered a decree in favor of the state, enjoining the defendants from the operation of its truck as a common carrier. Defendants appeal.

Affirmed.

Vernon W. Lynch, of Des Moines, for appellants.

Stephen Robinson, of Des Moines, and M. L. Mason, of Mason City, for appellees.

KINTZINGER, Justice.

The sole question for determination in this case is whether the defendant motor carrier is a common carrier or a private carrier.

It is conceded that the defendants operate a truck between fixed termini or over a regular route, in the state of Iowa, and at stated times. It is claimed by appellants, however, that under an agreement hereinafter set out the defendant Jack Rosenstein is employed by the Northern Iowa Film Service Association under a private contract to transport certain articles used by them, and furnish transportation service therefor, exclusively to the members of the association, and that because of this contract he became and is a private carrier. We have held in the recent case of *State v. Carlson*, 251 N. W. 160, decided at this term, that a private carrier is not subject to the provisions of chapters 252-A1 and 252-A2,

and that in order to come within the terms of such law it is necessary to show that he is engaged in the "public transportation of freight" between fixed termini or over a regular route. Defendant Jack Rosenstein was engaged in transporting moving picture films and advertising matter regularly between the city of Des Moines and Charles City, Hampton, Forest City, Britt, Clarion, Eagle Grove, Nevada, Osage, Kanawha, and Mason City.

The truck used in such transportation is not owned by the Northern Iowa Film Transportation Association but is the property of the defendant Rosenstein. It is claimed, however, that under the agreement in question the members of the association employed Jack Rosenstein to devote his entire and exclusive time to the transportation of films to the members of the association, and in consideration of which they agree to pay him compensation as may be later agreed upon. The agreement is substantially as follows:

"That whereas the party of the first part desires to employ the party of the second part to devote his entire and exclusive time to the transportation and delivery of films to the members of the association, party of the first part agrees to pay the party of the second part compensation as may hereafter be agreed upon."

"Northern Iowa Film Service Ass'n.

"By E. E. Morris, W. F. Smith, Leo Gilligan, W. R. Bandy, Charles Peterson, Sam Titler, M. A. Brown, Jack Keuch, C. D. Armentrout, Chas. Marks, Geo. Hake, H. Werwerk, G. W. Haight."

This agreement bears no date, provides for no duration of time, and is not signed by Jack Rosenstein, the purported party of the second part.

The record shows that until shortly prior to March 1, 1933, the defendant Jack Rosenstein was associated with one Esther Smith, who was engaged in the transportation business, including films, etc., under a certificate of necessity, and is complying with the provisions of chapters 252-A1 and 252-A2 of the Code. That as such common carrier she was transporting theater films and advertising matter to various theaters in the towns in question.

The evidence shows that a dispute arose between the Smith Transportation Company and the defendant Jack Rosenstein as a result of which his connection with the Smith Company was severed. That soon thereafter Rosenstein solicited the theater owners served by the Smith Company, for the purpose of securing their business, and of organizing the alleged "Northern Iowa Film Service Association." His solicitations resulted in the execution of the foregoing agreement.

At the trial the following stipulation, in substance, was agreed upon: "It is stipulated * * * between the parties hereto, that the defendant Jack Rosenstein and the 'Northern Iowa Film Service Association' operate a Chevrolet truck, Iowa license No. 85-366, 1933, of one ton capacity, weighing three thousand pounds, upon the public highways of the State, and that they are engaged in the exclusive transportation of moving picture films and advertising matter by said truck; and that the transportation of such picture films and advertising matter and the services furnished is regular each week to the defendants' customers in the towns on said route which the defendants serve. That such service is for compensation by the week, as agreed upon, and not on a ton or mileage basis, or under any fixed rate. That such compensation is paid by the parties served. That the defendants are so operating without having first procured a certificate of convenience and necessity, as provided by chapter 252-A1 of the Code, and without having made payment of the motor carrier tax as provided by chapter 252-A2 of the Code of 1931. That over part of the route covered by the defendants, the State has already issued a certificate to Esther Smith who is paying the ton mileage tax provided by chapter 252-A2, and who is also engaged in film transportation. That the defendants operate about 1927 miles per week, and that the service so rendered is regular to the various towns or theatres which they serve."

That such service was furnished regularly over a regular route from Des Moines to theaters in Charles City, Hampton, Forest City, Britt, Clarion, Eagle Grove, Nevada, Osage, Kanawha, and Mason City.

The evidence shows that transportation service was also furnished to three theaters in Mason City and one or two others, which had not signed the association agreement, and who were not members of the alleged association. The owners of the Cecil Theatre, the Palace Theatre, and the Strand Theatre at Mason City were not members of the association; they had not signed the agreement, and for the entire week preceding the trial of this action in the lower court, the defendant Rosenstein furnished service and delivered films to them at Mason City.

The evidence also fairly shows that at the time he solicited the owners of various theaters to become members of the alleged association, he told them it was for the purpose of being classified as a private carrier. Rosenstein had trouble with the Smith Company and he could not continue with them. He said he could not get a permit license because Smith had one; that he also stated he was "sore" at the Smith Company and would make them "holler."

The film association never had any meet-

ings, its members never paid any dues, it had no officers; the truck used in furnishing the service belonged to the defendant Jack Rosenstein and not the association. The association as such never received any compensation for any of the services furnished by Rosenstein, but all compensation for service furnished was paid to Rosenstein. Rosenstein told prospective members he was organizing a route, and had an agreement drawn up to be signed by the members to organize as the "Northern Iowa Film Service Association." He told them he would have the greater share of theaters in his territory. He also told them there was nothing binding in the association contract, but that he (Rosenstein) thought that it might help him if they signed an association agreement; that he could not get a permit, but by having an association, he would be able to carry the films.

There was also testimony in the record tending to show that Jack Rosenstein said he was forming an association which would haul for all theaters in the territory who would sign the association agreement.

We have thus set out much of the record in detail because the question for determination is one of fact, as to whether or not the operator of the truck, under the evidence, comes within the meaning of the term "common carrier."

Section 5105-a6 provides: "It is hereby declared unlawful for any motor carrier to operate or furnish public service within this state without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." It is not disputed that any person operating a motor truck between fixed termini or over a regular route, for the purpose of "public transportation of freight" for compensation, is a common carrier. Appellant contends that under the association agreement set out, the defendants were not engaged in "public transportation," that the relationship created was that of a private carrier. It is conceded that a "private carrier" operating between fixed termini is not subject to provisions 252-A1 and 252-A2.

[1] The question of fact to be determined is whether defendants were engaged in "public transportation"; if so, the operator of the truck was a common carrier; if not, he was a private carrier.

[2] It is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity. 10 C. J. 40.

[3, 4] The question whether one is a common carrier can sometimes be known only by particular proof of how his business is con-

ducted, and what professions he made to the public regarding it. *Campbell v. A. B. C. Storage & Van Co.*, 187 Mo. App. 565, 174 S. W. 140. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons, indifferently, who send him goods to be carried. *Robinson v. Cornish (City Ct.)* 13 N. Y. S. 577. A common carrier is one who holds itself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation. It is sometimes said that one who undertakes for only a single occasion to carry goods for any person who desires to employ it for that occasion is a common carrier for that transportation. 10 C. J. 41, § 10.

It is not necessary, however, to classify one as a public carrier, that he be required to carry goods of any description for every person offering the same. It is not necessary that he carry all kinds of goods, if he professes to carry only a certain kind, and, if so, this does not take from him his status as a common carrier. But in order to be held liable as a common carrier, the goods in question must be such as he professes to carry. In other words a common carrier may hold itself out to the public as being a carrier of specified articles only and if it is only engaged in the carriage of such articles it is under no obligation to carry other things. *Campbell v. A. B. C. Storage & Van Co.*, 187 Mo. App. 565, 174 S. W. 140; 10 C. J. 41, § 11; *Louisville & N. R. Co. v. Higdon*, 149 Ky. 321, 148 S. W. 26; *Wilson v. Atlantic Coast Line R. Co. (C. C.)* 129 F. 774; *Id.*, 66 C. C. A. 486, 133 F. 1022; *Chicago, M. & St. P. R. Co. v. Wallace*, 14 C. C. A. 257, 66 F. 506, 30 L. R. A. 161. So if he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. 4 R. C. L. 551, § 11; *Crescent Coal Co. v. Louisville & N. R. Co.*, 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442; *Levi v. Lynn & B. R. Co.*, 11 Allen (Mass.) 300, 87 Am. Dec. 713; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 25 P. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86; *Kirby v. Western Union Telegraph Co.*, 4 S. D. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. Rep. 765.

"At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements such as plows, harrows,

etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses." *Kansas Pac. Ry. Co. v. Nichols*, 9 Kan. 235, loc. cit. 253, 12 Am. Rep. 494; *California Powder Works v. Atlantic & P. R. Co.*, 113 Cal. 329, 45 P. 691, 38 L. R. A. 648 and note; *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450; *Cleveland, C., C. & St. L. R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710; *Coup v. Wabash, St. L. & P. Ry. Co.*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Oswego, D. & R. R. Co. v. Cobb*, 68 Or. 587, 135 P. 181; *Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 25 P. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86.

[5] In the instant case it is conceded that the truck in question was operated solely for the purpose of carrying theater films and advertising material. Therefore, if the defendant Jack Rosenstein held himself out to all the public engaged in that business, as offering to transport that class of goods, he would come under the definition of a common carrier. The undisputed evidence in this case shows that, in addition to the service furnished theaters which had signed the alleged association agreement, the defendant Rosenstein did transport, for the last week preceding the trial of this case, the same class of material to several other theaters in Mason City, Iowa, and a few other towns, which had not signed the alleged association agreement which the defendant claims makes him a private carrier. In fact this action was practically commenced while defendant Rosenstein was engaged in transporting goods to non-associate members in the same territory. Rosenstein was, to all intents and purposes, transporting theater films and advertising material the same as he was doing when connected with the Smith Company.

The evidence in this case upon this question fairly warrants the conclusion that the defendant Rosenstein was endeavoring to secure "association membership" contracts with all the picture houses in his territory up to the limit of his capacity. The testimony shows that he was "sore" at his former associate, and would soon make them "holler." It is apparent that he realized the improbability of his securing a certificate of convenience and necessity over the same route on which the Smith Company operated, and that in order to do any business in that territory, it would be necessary for him to come within the term of a private carrier. *Michigan Public Utilities Commission v. Krol*, 245 Mich. 297, 222 N. W. 718, 720. In that case the court said: "We cannot be insensible to the fact that defendant is now doing substantially all of the carrying business between Sault St. Marie and Detour; that which the motor transport company may lawfully do under its permit. To all intents and purposes there has been no change in the nature of the business done

by him after the last permit was refused, except that he sought to protect himself from a violation of the law by securing the contracts entered into from his regular patrons and performing other services which might be called 'errands' for customers. The law will not permit such an evasion of the intent and purpose of the statute."

We recognize the rule laid down in the case of *State v. Carlson*, filed at this session of court. That case, however, is distinguished from this, in that the defendant there was simply operating a delivery truck in the city of Fort Dodge for customers of various stores with whom he was under a private contract to make deliveries in and about that town. In that case we said: "Appellee rendered this delivery service only to merchants who were under contract with him." While in the case at bar the appellant had been, up to the very time this case was tried in the court below, delivering the same class of goods to other theaters without a contract, and there is nothing in this record to show that such service would not have continued if the defendants had not been restrained.

From the evidence introduced in this case as shown by the record, we are constrained to find that it was the purpose of the defendant Rosenstein to offer his transportation service to all theaters in his territory if he could induce them to enter the association agreement. In fact some of the theater owners signed the association agreement with the understanding that Rosenstein "would furnish transportation for all the theatres in their towns." He was engaged in the transportation of one class of merchandise only, and, if his service was offered to all the public engaged in that class of merchandise in his territory, there would be no reason for saying he was not engaged in public transportation of such goods. Under such circumstances he would become a common carrier even though all of such theaters had signed the alleged association agreement.

He was furnishing the service to theaters outside of the alleged association practically up to the time this action was commenced. His attempt to organize the alleged association was evidently a subterfuge to avoid the effect of chapters 252-A1 and 252-A2 of the Code.

The state is now struggling with difficult problems incident to the growth of automobile traffic, and the statutes in question should be liberally construed to give effect to their true intent and purpose. In *Bingaman v. Public Service Commission* (1933) 105 Pa. Super. Ct. 272, 161 A. 892, 893, the court said: "The evidence discloses that he did a motor trucking business, picking up goods at

certain mercantile establishments and making deliveries en route. He, conceding this, explains that these operations were all performed in conformity with eighteen private contracts made with various firms. These contracts are substantially uniform. They involve a compliance with a definite schedule on the part of Bingaman. They are made for one year with an option to either party to end them on 20 or 30 days' notice. Although there is no definite evidence of the appellant advertising or holding himself out as a common carrier, he admits that he would haul anybody's goods if they would sign a contract, and if approached on the subject would give the information that he was engaged in the business. There was some evidence that some merchandise was occasionally hauled and charged on the basis of the time consumed, and not under any written contract. It would seem that these acts are sufficient to constitute Bingaman a common carrier for within the limits of his operations he was available to every one who desired his services. If he, under his present arrangement, gets a new customer his engagement with such customer is the same as with all the rest of his patrons, and is in no sense of the word a special employment merely incidental or casual to his regular business. He cannot escape the application of the Public Service Act by making a written contract with each customer. * * * We have held that in a case closely resembling the present, the presence of a contract with each customer should not be a controlling factor in the determination of the question as to whether the person or corporation is a common carrier for 'contracts, express or implied, are an incident to nearly every form of transportation, whether by common or private carriage.'"

Under the evidence introduced in this case, the court below found that the operator of the truck was a common carrier. From a careful examination of all the evidence in this case, we are constrained to reach the same conclusion. We therefore find that, under the facts in this case, the operator of the truck in question was a motor carrier, furnishing public service in this state, between fixed termini, or over a regular route, and that as such was a common carrier and subject to the provisions of chapter 252-A1 and 252-A2.

The judgment of the lower court is therefore affirmed.

Affirmed.

CLAUSSEN, C. J., and EVANS, STEVENS, ANDERSON, KINDIG, and MITCHELL, JJ., concur.